COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

18-P-413

JOHN DOE, SEX OFFENDER REGISTRY BOARD NO. 392940

vs.

SEX OFFENDER REGISTRY BOARD.

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

The plaintiff (Doe) appeals from a Superior Court judgment upholding his classification as a level three sex offender by the Sex Offender Registry Board (SORB). Doe contends that he was denied due process when a mistake on a preliminary classification worksheet led to Doe receiving an inflated initial risk range, which in turn allegedly resulted in a higher final classification. Doe also argues that the SORB hearing examiner's (examiner) classification decision was arbitrary and capricious where there was no evidence of Doe's high degree of dangerousness, and also that the examiner misapplied several aggravating and mitigating factors. We disagree and affirm.

Background. Doe was required to register as a sex offender following his second conviction for open and gross lewd and lascivious behavior in 2012. See G. L. c. 6, §§ 178C-178Q.

SORB gave Doe a preliminary level three classification. See G. L. c. 6, §§ 178K (2), 178L (1). SORB's recommendation relied on a preliminary classification worksheet, see 803 Code Mass. Regs. § 1.06 (2016), that erroneously gave Doe a risk range of moderate to high, as opposed to the correct range of moderate to low. Doe was notified of SORB's recommendation and requested a hearing to challenge the classification.

An examiner took evidence on July 25, 2016, and on January 18, 2017, issued a decision classifying Doe as a level three offender.[1] We recite the facts found, and relied upon, by the examiner. Doe committed his first predicate offense for open and gross lewd and lascivious behavior in 1997 when he was twenty-four years old. In that case Doe waited for a woman in a parking lot while she went for a bicycle ride in a public park, and when she returned, Doe jumped in front of her and masturbated with his pants down. Additional predicate offenses occurred in 2011. In July, 2011, Doe was seen by several neighbors walking around and masturbating in his front yard. Doe was described as "highly intoxicated," and during the incident, he exposed himself to at least three people, including

[1] Doe was previously classified, after a hearing, as a level three sex offender in May of 2015; however, following the decision in Doe, Sex Offender Registry Bd. No. 380316 v. Sex Offender Registry Bd., 473 Mass. 297 (2015), the case was remanded for a new hearing under the clear and convincing evidence standard.

a thirteen year old boy and his father.[2] The police were called, and were advised by a neighbor that Doe had frequently engaged in such behavior, over a period of years.

Doe was arrested for the July 2011 incident, and in September of 2011, while awaiting trial, Doe engaged in very similar behavior, exposing himself in his front yard and masturbating. On this occasion the police witnessed the behavior directly. When Doe was arrested on this occasion he had two four-inch blade knives on his person.

The police reports from 2011 evidence that Doe's behavior often was directed at a female neighbor. The police were advised that Doe had been directing actions at the neighbor for years, including shining lights in her bedroom window and walking around outside naked. Doe's behavior "escalated" in 2011 to walking around outside naked in daylight hours, then dancing naked to get the neighbor's attention, and then masturbating while looking in her direction. The neighbor advised the police in 2011 that she had not reported Doe's activities previously, because she was afraid of what Doe might do to her.[3]

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[2] Doe pleaded guilty to three counts of open and gross lewd and lascivious behavior, and received two and one-half years in prison followed by five years' probation.

[3] The neighbor also told police that she had found a number of cigarette butts on her property, which she believed were the result of Doe standing outside her windows and watching her.

Doe's history of sexual misconduct is not limited to the predicate offenses. Doe previously admitted to masturbating in public and exposing himself to motorists in 1990 when he was seventeen years old, and in 1992 Doe was convicted of indecent exposure for the same conduct on a different occasion.

Doe's criminal history also extends beyond sexual offenses, and includes several violent crimes and instances of domestic violence. Since 1994 Doe has been convicted of two separate incidents of assault and battery, including one with a dangerous weapon (shod foot), two separate incidents of threatening bodily harm, two separate incidents of witness intimidation, and three violations of abuse prevention orders.[4]

An expert psychologist submitted evidence on Doe's behalf. The expert opined that Doe suffered from exhibitionism, as described in the Diagnostic and Statistical Manual of Mental Disorders. The expert noted that Doe had a long history of substance abuse, which the expert believed contributed to Doe's

[4] Many of these offenses stem from altercations that occurred between Doe and his mother, or his ex-girlfriend. Police reports indicate that Doe "pushed" and "kicked" his mother on multiple occasions. Doe also assaulted an ex-girlfriend by punching her, throwing her to the ground, grabbing her by her hair, and kicking her. He threatened to "beat her up," "kill her or any other man she was with," and to "cut her throat out" if she reported the incidents to police. Doe also repeatedly made threatening telephone calls to his ex-girlfriend -- and even accosted the ex-girlfriend's family members to find out where she was living.

exhibitionism. Although the expert acknowledged Doe's disorders, and that exhibitionists tend to reoffend at high rates, she ultimately opined that Doe posed a low risk to reoffend and a low level of danger.[5]

Doe sought judicial review of his classification in the Superior Court under G. L. c. 30A, § 14, and G. L. c. 6, § 178M. Doe's motion for judgment on the pleadings was denied, and the level three classification was affirmed. Doe now appeals.

Discussion. 1. Preliminary classification worksheet error. Doe argues first that his due process rights were infringed because SORB made a mistake when completing its "preliminary [c]lassification [w]orksheet." The mistake, which is conceded, caused SORB's preliminary classification to have a risk range of moderate to high, as opposed to the correct risk range of moderate to low. Doe contends as a result he received an incorrect preliminary level three classification, which allegedly prejudiced the examiner's final decision. We do not agree.

The mistaken worksheet at issue is part of the classification process and is referenced in the SORB regulations and in the case law; however, the worksheet is not binding and

[5] The expert opined that Doe was a "passive" exhibitionist who had committed purely exposure offenses, and who was unlikely to actively pursue his targets or to escalate his behavior to contact offenses.

thus has no legal impact on the hearing examiner's final decision. See Doe, Sex Offender Registry Bd. No. 3844 v. Sex Offender Registry Bd., 447 Mass. 768, 772 (2006) (Doe No. 3844); 803 Code Mass. Regs. § 1.04(4) (2016) ("In determining the final classification, the hearing examiner . . . shall not be bound by the Board's recommendations"). Rather, the final classification is determined de novo by the hearing examiner, based upon the regulatory factors and the facts adduced at the hearing. See Doe No. 3844, supra; 803 Code Mass. Regs. §§ 1.04(3)-(4), 1.20(2) (2016).

Doe accordingly is not entitled to relief merely because SORB made a preliminary classification error. Contrary to Doe's contention, errors made by an agency in applying its regulations do not thereupon automatically become denials of "due process." Nor does Doe suggest that he had some core right to a preliminary classification. And, given that the final decision was not based upon the preliminary classification, Doe cannot show prejudice in any event. See Doe, Sex Offender Registry Bd. No. 209081 v. Sex Offender Registry Bd., 478 Mass. 454, 458-459 (2017).

2. Level three classification. Doe next challenges the evidentiary basis for his level three classification. The level three classification must be based upon clear and convincing evidence that (1) Doe has a high risk of reoffending, and that

(2) Doe has a high level of dangerousness. See Doe, Sex Offender Registry Bd. No. 380316 v. Sex Offender Registry Bd., 473 Mass. 297, 314 (2015); G. L. c. 6, § 178K (2) (c). On appeal this court will only disturb the examiner's decision if it is not supported by substantial evidence, is arbitrary and capricious, an abuse of discretion, or not in accordance with the law. Doe, Sex Offender Registry Bd. No. 10800 v. Sex Offender Registry Bd., 459 Mass. 603, 633 (2011). Our review "does not turn on whether, faced with the same set of facts, we would have drawn the same conclusion, . . . but only whether a contrary conclusion is not merely a possible but a necessary inference" (quotation omitted). Doe, Sex Offender Registry Bd. No. 3839 v. Sex Offender Registry Bd., 472 Mass. 492, 500-501 (2015). "In conducting our review, we 'give due weight to the experience, technical competence, and specialized knowledge' of the board." Doe, Sex Offender Registry Bd. No. 151564 v. Sex Offender Registry Bd., 456 Mass. 612, 615 (2010), quoting G. L. c. 30A, § 14 (7).

Doe argues that the level three classification is arbitrary and capricious because it is not supported by specific evidence that Doe poses a high risk of danger to the public. Doe relies heavily on his assertion that his only sex crime convictions were for "noncontact offenses." We are not persuaded.

The nature of the crime that triggers the sex offender registration requirement is only one consideration of many in determining an offender's classification level. See 803 Code Mass. Regs. § 1.04(4) (examiners shall base final classification on application of discreet factors enumerated in § 1.33). Here, as the examiner found, Doe's level three classification is supported by Doe's extensive criminal history over many years, which history includes sexual, nonsexual, and violent offenses. This history shows numerous acts by Doe that seriously threatened his victims, and that give cause for reasonable and heightened concern regarding his dangerousness. For example, Doe persistently abused and harassed his female neighbor over several years; Doe's acts included acting out sexually, and his acts escalated and continued into at least 2014. Similarly, although Doe's first sexual offense has been described as "passive," it involved elements of stalking a woman in a public place, whom Doe then confronted at close range. While Doe may not have had actual contact with the victims of his sex crimes, Doe put at least some of them in reasonable fear that contact would occur.

Doe has also threatened, and committed, violent crimes. As previously discussed, Doe's nonsexual offense record is lengthy and disturbing. When he was finally arrested in September of 2011, he was carrying two four-inch blade knives in his pocket.

Given this record, the examiner applied multiple regulatory factors, see 103 Code Mass. Regs. § 1.33 (2016), that support the conclusion that Doe poses a high degree of danger to the public. These include factors seven (relationship between offender and victim), see 103 Code Mass. Regs. § 1.33(7), ten (contact with criminal justice system), see 103 Code Mass. Regs. § 1.33(10), eleven (violence unrelated to sexual assaults), see 103 Code Mass. Regs. § 1.33(11), and thirteen (noncompliance with community supervision), see 103 Code Mass. Regs. § 1.33(13). The examiner has the discretion to determine which statutory and regulatory factors are applicable and how much weight to give them. Doe, Sex Offender Registry Bd. No. 68549 v. Sex Offender Registry Bd., 470 Mass. 102, 109-110 (2014) (Doe No. 68549). The examiner did not abuse that discretion here, where there was substantial evidence supporting each factor.

Doe argues further that the examiner improperly applied certain aggravating factors -- in particular, factors seven, seventeen (male offender and male victim), see 103 Code Mass. Regs. § 1.33(17), and twenty-two (number of victims), see 103 Code Mass. Regs. § 1.33(22) -- that "should not logically apply to exhibitionist offenders." Doe's theory is that because exhibitionists by their nature are not discriminating as to their victims, these factors should be discounted when evaluating an exhibitionist. There is nothing in the statutory

scheme or the regulatory factors, however, that suggests that these factors apply differently to exhibitionist offenders. Nor does Doe's theory have any support in the case law. It may be true that the nature of a particular exhibitionist offense means that the above factors should be afforded less weight -- for example, because a certain victim or victims was not really a target of the defendant's act. But the weighing will depend on the circumstances, and here Doe's offenses were more than "passive" -- as noted above, some were specifically directed at certain victims, whom Doe put in fear.[6]

Finally, Doe's reliance on the SORB operations policy 006 (effective May, 2002) to suggest that the above factors should not apply to offenders convicted of open and gross lewd and lascivious behavior is misplaced. That operations policy states, in its first full sentence, "The purpose of this policy is to establish procedures and guidelines to be utilized when initiating and completing SOR FORM 25-R Classification Worksheet and Findings" (emphasis added). The policies contained therein apply to the preliminary classification and are not applicable

[6] Doe faults the examiner for failing to credit the opinions of his expert. The examiner considered the expert's opinions, however, and appropriately explained why he was not persuaded by them. The examiner of course was not obliged to accept the expert's opinion, see Doe No. 68549, 470 Mass. at 112, particularly where the expert's opinion that Doe was a "passive" offender was contradicted by the record evidence.

to the examiner's final classification determination, which is controlled by G. L. c. 6, § 178L (2), and 803 Code Mass. Regs. §§ 1.04(3)-(4), 1.33.[7,8]

Judgment affirmed.

By the Court (Maldonado, McDonough & Englander, JJ.[9]),

Joseph F. Stanton

Clerk

Entered: July 3, 2019.

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[7] Doe also argues that the hearing examiner erred by not considering the mitigating effect of Doe's age, which was forty-three years old at the time of the hearing. However, factor thirty (advanced age) only "has a mitigating effect on risk of reoffense," 803 Code Mass. Regs. § 1.33(30); it is not considered as a mitigating fact for dangerousness, which is the issue Doe focuses on here.

[8] To the extent we have not specifically commented, we have considered Doe's remaining arguments and have found them without merit. See Commonwealth v. Silva, 93 Mass. App. Ct. 609, 619 n.8 (2018).

[9] The panelists are listed in order of seniority.